BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 5819 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

GAIL M. CAMARA
(Claimant)

S.S.A. No.

CALIFORNIA PIG STANDS, INC.
(Employer-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-213

FORMERLY
BENEFIT DECISION
No. 5819

The above-named employer on August 17, 1951, appealed from the decision of a Referee (LA-44232) which held that the claimant was not subject to disqualification under the provisions of Section 58(a)(1) and 58(a)(2) of the Unemployment Insurance Act (now section 1256 of the Unemployment Insurance Code). Oral argument on behalf of the employer was heard on October 15, 1951, in Los Angeles. The claimant, although afforded an opportunity to do so, did not appear for oral argument.

Based on the record before us, our statement of fact, reason for decision, and decision are as follows:

STATEMENT OF FACT

The claimant was last employed as a waitress by the appellant-employer until April 13, 1951, when her employment was terminated under circumstances hereinafter set forth. On June 4, 1951, the claimant registered for work and filed a claim for benefits in the Los Angeles Office of the Department. The employer filed a protest and on June 19, 1951, the Department issued a determination holding that the claimant was eligible for benefits and not subject to disqualification under either Section 58(a)(1) or 58(a)(2) of the

Unemployment Insurance Act (now section 1256 of the code).

Prior to April 11, 1951, the claimant informed her employer that she contemplated leaving her work on a specified date in order to join her husband in Guam. On the date the claimant was supposed to leave she informed her employer that she postponed her trip and that she would leave on some indefinite date in the future; that she would give the employer one week or two weeks notice before leaving.

The claimant last worked on April 11, 1951. She did not report for work on April 12 and 13 because her three-year-old son was, at that time, confined to a hospital with a fatal disease. The claimant did not communicate with her employer during her absence because she was during this period constantly at her child's bedside and her thoughts were completely preoccupied with her child. On April 13, 1951, the employer not having heard from the claimant replaced her believing that she left for Guam. On April 14, 1951, the claimant reported to her employer and explained the reason for her absence. Although the claimant indicated her willingness to return to work she was formally removed from the payroll on April 15, 1951, and advised that there was no job for her. A representative of the employer testified that it is the policy of the employer to terminate the employment of any employee who is absent from work for a period of two or three days without notifying the employer.

The claimant had not on any prior occasion taken time off from work without authorization. She was a satisfactory employee and had never been reprimanded or warned by her employer for any dereliction of duty.

REASON FOR DECISION

Section 58(a)(1) of the Act (now a portion of section 1256 of the code) provides as follows:

> "(a) An individual shall be disqualified for benefits if:
>
> "(1) He has left his most recent work voluntarily without good cause, if so found by the commission."

In Benefit Decision No. 5421-12223, we considered various decisions of this Board dealing with the issue of voluntary leaving of work under Section 58(a)(1) of the Act (now section 1256 of the code), and we determined that a claimant could not be held to have left work voluntarily in a situation where an employer had the choice of retaining his services or discharging him since the issue in such situations was one of misconduct discharge under Section 58(a)(2) of the Act (now section 1256 of the code).

In the instant case the employer terminated the claimant's employment by reason of her unexplained absence from work for two days. But for this action by the employer the claimant would have returned to work. We hold, therefore, that the claimant did not voluntarily leave her work but was discharged by her employer. Hence Section 58(a)(1) of the Act (now section 1256 of the code) is not applicable. Section 58(a)(2) of the Act (now section 1256 of the code) provides as follows:

> "(a) An individual shall be disqualified for benefits if:
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> * * *
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> "(2) He has been discharged for misconduct connected with his most recent work, if so found by the commission; provided that, an individual shall be presumed to have been discharged for reasons other than misconduct in connection with his work and not to have voluntarily left his work without good cause unless his employer shall have given notice to the contrary to the commission in writing within five days after the termination of service, setting forth such facts as are necessary to establish a prima facie case in support thereof. If the employer files such notice, the question shall immediately be determined in the same manner as benefit claims; . . ."

The Appeals Board has consistently applied the definition of misconduct laid down by the Supreme Court of Wisconsin in Boynton Cab Company v. Neubeck, 296 N.W. 636:

> ". . . The term 'misconduct' as used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of any employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgement or discretion are not to be deemed 'misconduct' within the meaning of the statute." (Benefit Decisions Nos. 4648 and 5566).

In Benefit Decision No. 4828, we held that isolated instances of tardiness or absence from work, where there has been no previous reprimand or warning from the employer, do not constitute misconduct. In the instant case the claimant had a satisfactory record of performance until the occasion in question. She had never previously been warned or reprimanded for any dereliction of duty. Furthermore, considering the circumstances which gave rise to her absence it cannot be said that her conduct evinced a wilful or wanton disregard of her employer's interests. We conclude, therefore, that the claimant cannot be held to have been discharged for misconduct within the meaning of Section 58(a)(2) of the Act (now section 1256 of the code).

DECISION

The decision of the Referee is affirmed. Benefits are payable as provided in the decision of the Referee.

Sacramento, California, November 23, 1951.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

MICHAEL B. KUNZ, Chairman

GLENN V. WALLS

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Pursuant to section 409 of the Unemployment Insurance Code, the above Benefit Decision No. 5819 is hereby designated as Precedent Decision No. P-B-213.

Sacramento, California, February 5, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

HARRY K. GRAFE

RICHARD H. MARRIOTT